No. 90-5538

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1990

ZAKHAR MELKONYAN - Petitioner
vs.
MARGARET M. HECKLER, Secretary of Health and Human Services - Respondent

PETITION FOR WRIT OF CERTIORARI

TO THE UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

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ORIGINAL

90-5538

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1990

No. _____

ZAKHAR MELKONYAN, Petitioner

v.

MARGARET M. HECKLER
Secretary of Health and Human Services

MOTION FOR LEAVE TO PROCEED IN FORMA PAUPERIS

The petitioner, Zakhar Melkonyan, asks leave to file the attached petition for a writ of certiorari without prepayment of costs and to proceed in forma pauperis. Petitioner has previously been granted leave to proceed in the District Court for the Central District of California and the Court of Appeals for the Ninth Circuit.

Petitioner's affidavit in support of this motion is attached hereto.

John Ohanian, Inc.
Counsel for Petitioner

AFFIDAVIT IN SUPPORT OF A MOTION TO PROCEED IN FORMA PAUPERIS

I, Zakhar Melkonyan being first duly sworn, depose and say that I am the petitioner in the above-entitled case, that in support of my Motion for leave to Proceed In Forma Pauperis, I state that because of my poverty I am unable to pay the costs of this case or to give security therefor; and that I believe I am entitled to redress.

I further swear that the responses which I have made to the questions and the instructions below relating to my ability to pay the cost of the proceeding in this Court are true.

1. Are you presently employed? Yes____ No X

a. If the answer is yes, state the amount of your salary or wages per month and give the name and address of your employer.

b. If the answer is no, state the date of your last employment and amount of the salary or wages per month which you received.
MAY 1980 100 RUBLES PER MONTH

2. Have you received within the past twelve months any income from a business, profession, or other form of self employment, or in the form of rent payments, interest, dividends or other sources?
Yes X No____

a. If the answer is yes, describe each source of income and state the amount received from each during the past twelve months.
SSI DISABILITY $583.50 PER MONTH

3. Do you own any cash or checking or savings account?
Yes X No____

a. If the answer is yes, state the total value of the items owned. $730.00

4 Do you own any real estate, stocks, bonds, notes, automobil., or other valuable property (excluding ordinary household furnishings and clothing)? Yes____ No X

a. If the answer is yes, describe the property and state its approximate value.

5. List the persons who are dependent upon you for support and state your relationship to those persons.

I understand that a false statement or answer to any question in this affidavit will subject me to penalties for perjury.

Zakhar Melkonyan
Zakhar Melkonyan

Subscribed and sworn to before me this 14th day of August 1990

Notary

My commission expires: July 2, 1991.

OFFICIAL SEAL
JERONIMO MERAYO
NOTARY PUBLIC - CALIFORNIA
LOS ANGELES COUNTY
My comm. expires JUL 2, 1991

QUESTIONS PRESENTED

The questions presented are:

1. For the purpose of starting the running of the 30 day period for filing a petition for attorney's fees under the Equal Access To Justice Act (EAJA), (in a case remanded to the Secretary of Health and Human Services), is the "final judgment in the action" the new administrative decision, or is it a subsequent order or judgment of the court.

2. If the "final judgment in the action" is the new administrative decision, should the decision of the court of appeals operate retroactively?

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PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

The petitioner, Zakhar Melkonyan respectfully prays that a writ of certiorari issue to review the order and opinion of the United States Court of Appeals for the Ninth Circuit filed in this case on January 31, 1990.

OPINIONS BELOW

The opinion of the Court of Appeals is reported at 895 F.2d. 556 (9th Cir. 1990). (App. 6-10). An earlier opinion, which was withdrawn, is reported at 878 F.2d 1183 (9th Cir. 1989). On May 29, 1990, the Court of Appeals denied the petition for a rehearing and rejected the suggestion for rehearing en banc. (App. 11) the order is unreported. The order of the United States District Court for the Central District of California (App. 1-5) is also unreported.

JURISDICTION

The order and opinion sought to be reviewed was filed on January 31, 1990. A petition for rehearing was denied on May 29, 1990. The jurisdiction of this Court is invoked under 28 U.S.C. section 1254(1).

STATUTORY PROVISIONS INVOLVED

The Equal Access to Justice Act, 28 U.S.C. section 2412(d)(1)(A) provides in pertinent part:

> Except as otherwise specifically provided by statute, a court shall award to a prevailing party other than the United States fees and other expenses, in addition to any costs awarded pursuant to subsection (a), incurred by that party in any civil action (other than cases sounding in tort), including proceedings for judicial review of agency action, brought by or against the United States in any court having having jurisdiction of that action, unless the court finds that the position of the United States was substantially justified or that special circumstances make an award unjust.

Section 2412(d)(1)(B) provides in pertinent part:

> A party seeking an award of fees and other expenses shall, within thirty days of final judgment in the action, submit to the court an application for fees and other expenses which shows that the party is a prevailing party and is eligible to receive an award under this subsection, and the amount sought, including an itemized statement ... stating the actual time expended and the rate at which fees and other expenses are computed. The party shall also allege that the position of the United States was not substantially justified.

Section 2412(d)(2)(G) provides in pertinent part:

> "[F]inal judgment" means a judgment that is final and not appealable, and includes an order of settlement...

Title XVI of the Social Security Act, 42 U.S.C. section 1383(c)(3), which relates to petitioner's SSI application, provides in pertinent part:

> The final determination of the Secretary after a hearing under paragraph (1) shall be subject to judicial review as provided in section 405(g) of this title to the same extent as the Secretary's final determinations under section 405 of this title.

Title II of the Social Security Act, 42 U.S.C. section 405(g), provides in pertinent part:

> [T]he Secretary shall, after the case is remanded, ... file with the court any such additional and modified findings of fact and decision, and a transcript of the additional record and testimony upon which his action in modifying or affirming was based.

STATEMENT OF THE CASE

This case presents a question as to the timeliness of an application for attorney's fees filed under the EAJA. The underlying litigation involves an application for supplemental security income (SSI) disability benefits under Title XVI of the Social Security Act.

On May 28, 1982, petitioner Zakhar Melkonyan filed an application for SSI disability benefits under section 1614(a)(3)(A), of the Social Security Act, as amended. 42 U.S.C. section 1382c (3)(A). The respondent agency denied the application holding that claimant Melkonyan was not disabled.

On June 8, 1984, petitioner Melkonyan filed a complaint in United States district court under 42 U.S.C. section 1383c(3)(A) which incorporates the provisions of 42 U.S.C. section 405(g) for judicial review of the agency's decisions.

On April 5, 1985, the district court remanded the cause back to the Secretary with the consent of both parties, for further administrative proceedings including consideration of new evidence.

On May 7, 1985, the respondent's Appeals Council issued a decision finding that Mr. Melkonyan was entitled to the SSI benefits for which he had initially applied on May 28, 1982.

The Secretary paid past due benefits to petitioner Melkonyan

on September 11 and 17, 1985, some 130 days later. The calculation of benefits was satisfactory, so that Mr. Melkonyan did not seek further administrative or judicial review.

The Secretary did not file the new record, findings, or decision in the district court as required by 42 U.S.C. section 405(g). On May 19, 1986, Mr. Melkonyan filed an application in district court for an award of EAJA attorney fees. The Secretary opposed the application on the grounds that Melkonyan was not a "prevailing party," and that even if he were, the agency's position was substantially justified.

The district court denied the EAJA application on February 18, 1987, for the sole reason that the agency's position had been substantially justified. (App. 1-5).

Petitioner Melkonyan then appealed the EAJA denial to the United States Court of Appeals for the Ninth Circuit which without reaching the issue of substantial justification, sua sponte instructed the district court to dismiss the EAJA application as untimely. On June 30, 1989, the circuit court filed its order and opinion dismissing the appeal on the ground that petitioner's EAJA application had not been filed timely. The court held that the agency's letter to Melkonyan computing and awarding his past due benefits pursuant to the Appeals Council's decision, was the "final judgment" in the action triggering the running of the 30 day period. On July 13, 1989, petitioner filed a petition for rehearing en banc and on January 31, 1990, the circuit court dismissed the cause for lack of subject matter jurisdiction.

On February 12, 1990, petitioner once more filed a petition for rehearing en banc, and on May 29, 1990, the circuit court issued an order (App. 11) denying rehearing and rejected the suggestion for rehearing en banc. The Ninth Circuit thus held that petitioner's application for EAJA attorney's fees should have been filed within 30 days of May 7, 1985, the date of the Appeals Council's new administrative decision.

REASONS FOR GRANTING THE WRIT

A. THE DECISION BELOW CONFLICTS SQUARELY WITH DECISIONS OF THE THIRD, FOURTH, AND ELEVENTH CIRCUITS

The decision below conflicts with other circuits on an important question of federal procedure. The Ninth Circuit held in this instance that the federal courts need no longer comply with 42 U.S.C. section 405(g), which provides in pertinent part, the "Secretary shall, after the case is remanded, and after hearing such additional evidence if so ordered, modify or affirm his findings of fact or his decision, or both, and shall file with the court any such additional and modified findings of fact and decision, and a transcript of the additional record and testimony upon which his action in modifying or affirming was based," whereupon the court may issue its judgment.

The Third, Fourth, and Eleventh Circuits explicitly disagree. Brown v. Secretary of HHS, 747 F.2d 878, 884-85 (3rd Cir. 1984); Guthrie v. Schweiker, 718 F.2d 104, 106 (4th Cir. 1983); Taylor v. Heckler, 778 F.2d 674, 677 (11th Cir. 1985). These circuits agree that upon a new determination by the agency that the

claimant is entitled to benefits, the Secretary will return to the district court pursuant to section 405(g), and file an appropriate motion for disposition. Whereupon, the district court then may issue a dispositive order and/or judgment affirming, modifying, or reversing the Secretary's decision.

The decision by the court below acknowledged the Guthrie decision, but found that it had been legislatively overruled. The court noted that Guthrie had been decided before the 1985 amendments to the EAJA, which redefined the term "final judgment" as "a judgment that is final and not appealable." Melkonyan, 895 F.2d at 559, quoting 28 U.S.C. section 2412(d)(2)(G). The Ninth Circuit decided that Guthrie was inconsistent with the amended language of the statute, and thus, refused to follow the Fourth Circuit's holding. The court's conclusion, however, clearly appears erroneous in light of the legislative history of the 1985 amendments to the statute.

The legislative history of the 1985 amendments to the EAJA explicitly follows the Fourth Circuit's holding in Guthrie. The legislative history states that neither the judicial remand to the agency nor the agency decision after remand constitutes final judgment. H.R. Rep. No. 120, 99th Cong., 1st Sess., pt. 1 at 19-20 (1985), reprinted in 1985 U.S. Code Cong. & Admin. News 132, 148 (1985), citing Guthrie. Had Congress intended to overrule Guthrie, it clearly would not have cited Guthrie with approval in the legislative history. In fact, the legislative history clearly implies that Congress intended that the courts continue to follow

Guthrie.

In addition, the legislative history to 28 U.S.C. 2412 (d)(2)(G) states "[t]his section should not be used as a trap for the unwary resulting in the unwarranted denial of fees." Id. at 146 n.26. Obviously, a result contrary to the legislative history would present a trap for the unwary who relied on its authority when filing for attorney's fees.

B. THE DECISION BELOW DIFFERS WITH THIS COURT'S RECENT DECISION IN SULLIVAN v. HUDSON

This Court's decision in Sullivan v. Hudson, 109 S.Ct. 2248, 2255 (1989), cites with approval Guthrie's holding, that a "final judgment" requires district court action before a civil action is concluded following a remand. The principle from Guthrie which this Court approved, is the same principle that the court below found "troublesome." The decision below discontinues the post-remand "additional action" in the district court which was mandated by Guthrie, and noted in Hudson with approval.

In Sullivan v. Hudson, 109 S.Ct. 2248, 2255 (1989), this Court held:

> [T]he EAJA provides that an application for fees must be filed with the court "within thirty days of final judgment in the action." 28 U.S.C. section 2412(d)(1)(B) (1982 ed., Supp. V). As in this case, there will often be no final judgment in a claimant's civil action for judicial review until the administrative proceedings on remand are complete. See Guthrie v. Schweiker, 718 F.2d 104, 106 (CA 4 1983). ("[T]he procedure set forth in 42 U.S.C. section 405(g) contemplates additional action both by the Secretary and a district court before a civil action is concluded following a remand"). The Secretary concedes that a remand order from a district court to the agency is not a final determination of the civil action and that the district court retains jurisdiction to review any determination rendered on remand." Brief for petitioner 16-17.

In applying the holding in Guthrie to the present case, it is clear that a "final judgment" has not yet been rendered. Both Guthrie and the legislative history to 28 U.S.C. section 2412(d)(2)(G) require the district court to enter a "final judgment" after the decision of the Appeals Council, after which the filing period for attorneys' fees will start to run. Before a district court can enter "final judgment" in any case, the Secretary must file with the court those documents required by 42 U.S.C. section 405(g). The court will then review those documents and enter its "final judgment," after which the plaintiff may file his motion for attorney's fees under the EAJA.

A basic premise of the circuit court is erroneous because the panel believed that the district court would not have jurisdiction to enter final judgment on the merits of this case, since neither party disagreed with the new administrative decision. Thus, the panel concluded that some prior administrative event must have triggered the 30 day time limit for filing the EAJA application. The court believed that the rule in Guthrie would necessitate wasteful sua sponte review of the merits of the Secretary's new decision.

An accurate reading of Hudson, Guthrie, and numerous federal court cases dealing with this issue, clearly establishes that full judicial review of the merits of the disability claim is not only not necessary, but that the courts do not perform such review in day-to-day practice. If both parties are satisfied with

the agency's new decision, the district court merely enters a short order and/or judgment affirming the Secretary's decision.

Hudson and Guthrie only call for "additional action" by the court and not sua sponte review of the merits. In practice, this requires the district court judge to merely sign an order and/or judgment prepared by counsel for either party. The court in Tripodi v. Heckler, 100 F.R.D. 736 (E.D.N.Y. 1984), described the day-to-day practice of the district courts, saying, "[a]fter the Secretary reaches a decision on remand, the government generally either renews its motion for summary judgment, or moves to dismiss the complaint as moot. Only after the district court disposes of the case can the case be appealed. The result should be the same under the Equal Access To Justice Act. The thirty-day time period begins to run when the final order is entered in the district court dismissing the case."

C. THE DECISION BELOW DIFFERS WITH THIS COURT'S RECENT DECISION IN SULLIVAN v. FINKELSTEIN

The decision of the court below is also inconsistent with this Court's recent decision in Sullivan v. Finkelstein, 110 S.Ct. 2659 (1990). In Finkelstein, at pp. 2664-2665, this Court discussed 42 U.S.C. section 405 (g), and analyzed each sentence of the statute's remand provisions. This Court held that there are two different types of remand under 42 U.S.C. section 405 (g), (fourth sentence and sixth sentence remands), with resulting different procedures and results.

This Court explained in Finkelstein that in a sentence six

remand, the district court may remand for the taking of additional evidence, but only upon a showing that there is new evidence that is material and there is good cause for the failure to incorporate such evidence into the record in a prior proceeding.

Remand of the instant case was a sentence six remand, since petitioner had furnished new evidence to the district court and the respondent filed a motion for voluntary remand for further administrative proceedings on December 18, 1984. On April 3, 1985, the district court remanded the cause to the respondent for further administrative proceedings.

The decision in Finkelstein, at p. 2664, explains that in a sentence six remand, the district court may review "[s]uch additional or modified findings of fact," and that such remand requires that "the Secretary shall, after the case is remanded, and after hearing such additional evidence if so ordered, modify or affirm his findings of fact or his decision, or both, and shall file with the court any such additional and modified findings of fact and decision." Pursuant to sentence seven, the "additional or modified findings of fact and decision shall be reviewable only to the extent provided for review of the original findings of fact and decision. And, under sentence eight, "[t]he judgment of the court shall be final." (See also footnote 8, at p. 2665).

Thus, this Court explained that in a sentence six remand, 42 U.S.C. section 405(g) requires that after a district court remand, the respondent Secretary must file "additional findings of fact or decision," whereupon the district court will issue its

final judgment. Consequently, it is apparent that the decision in this case by the court below is contrary to this Court's decision in Finkelstein.

D. THE DECISION BELOW WILL INCREASE THE "SECOND LITIGATIONS" BETWEEN CLAIMANTS AND THE SECRETARY WITH RESPECT TO THE ISSUE OF TIMELINESS OF FILING EAJA APPLICATIONS

Fully 92% of all EAJA applications filed in the district courts are against the respondent Secretary; nearly all relate to cases involving Social Security claims. The claimants win 90% of the applications against the Secretary, and the average award is less than $3,000.1/

Many of these EAJA applications arise in cases where the court remanded the cause to the Secretary. Social Security statistics show that almost three times as many claimants are awarded benefits by administrative decision after court remand than by outright court reversal.2/

1/ Data from Fiscal Year 1989. Of 411 applications filed against the Secretary, fees were awarded in 369. See Report of the Director of the Administrative Office of the United States Court on Requests for Fees and Expenses Under the Equal Access To Justice Act, reprinted in Annual Report of the Director of the Administrative Office of the United States Courts 1989.

2/ While 5,135 Social Security claimants obtained favorable decisions from the agency after court remand, 1,893 obtained favorable decisions directly from court reversals in Fiscal Year

Efficient judicial handling of these relatively small claims requires a clear rule about timeliness which the affected claimants, their attorneys, the respondent Secretary, and the courts may follow consistently in all Social Security EAJA applications. Unfortunately, the decision below demonstrates that the Secretary has terminated his compliance with 42 U.S.C. section 405(g), and he no longer follows his publicly declared policy and practice as historically understood by the practicing bar.

In 1984, the Secretary told the Court of appeals for the Third Circuit that "should a claimant receive benefits upon remand, the case must still return to the district court for a final judgment." Further, the Secretary represented to the court that "the Secretary will return to the district court and file a copy of any remand proceeding in which a claimant receives benefits." Brown, supra, 747 F.2d at 884 [emphasis in original].

The Secretary recently advised this Court of the same policy and practice in Finkelstein:

> Of course, where the court has remanded the cause to the Secretary for a rehearing because it has found the Secretary's first decision denying benefits to have been unlawful, it is appropriate for the Secretary to file any new decision awarding benefits with the court so that the court can consider whether attorney's fees should be awarded under the EAJA. See Sullivan v. Hudson, 109 S.Ct. at 2255.

Brief for Petitioner in Sullivan v. Finkelstein, No. 89-504, at 44, n. 35.

There should be no question that this long standing practice

1989. Office of Hearings and Appeals, Office of Civil Actions, Social Security Administration.

for complying with 42 U.S.C. section 405(g) in the EAJA context, has been and continues to be the required standard for compliance with the law. The decision below, holding that post remand judicial proceedings are not required, thus conflicts with the Secretary's own statement made recently in Sullivan v. Finkelstein.

Until now, only a few EAJA applications per year have been denied due to untimely filing of applications.3/ Unfortunately, with the decision below, it now appears the Secretary will litigate nationally the timeliness of all EAJA applications which were filed more than 30 days after the new agency decision. This policy change will create technical "second litigations" by the Secretary in many small EAJA claims brought by disabled and vulnerable beneficiaries.

E. IF THE "FINAL JUDGMENT IN THE ACTION" IS THE NEW AGENCY DECISION, THE NINTH CIRCUIT'S DECISION SHOULD NOT APPLY RETROACTIVELY, BUT SHOULD ONLY OPERATE PROSPECTIVELY

The Ninth Circuit should have invoked its equity powers in order to prevent injustice to hundreds if not thousands, of social security claimants and attorneys who were caught in a trap for the unwary by the court's unexpected decision overturning Guthrie, and its progeny of cases, in holding that federal courts no longer need to comply with 42 U.S.C. section 405(g) of the Social Security Act.

3/ Administrative Office of U.S. Courts, supra n. 1 (13 timeliness denials out of 501 applications in FY 1989).

The court in Brown v. Secretary of HHS, 747 F.2d at 885, stated in its decision of November 23, 1984, that should the Secretary fail in the future to follow his historical procedure of notifying the district court after completion of a remand, so that the district court would then enter the final judgment contemplated by the EAJA, "we note that remanding courts are vested with full equity powers, and may adjust their relief to reflect such changed circumstances. See e.g., Ford Motor Co. v. NLRB, 305 U.S. 364, 373, 59 S.Ct. 301, 306, 83 L.Ed. 221 (1939) (remanding court 'may adjust its relief to the exigencies of the case in accordance with equitable principles ... to secure a just result')." Continuing, the court pointed out that equitable tolling of the statute of limitations is permissable, citing Northern Metal Co. v. United States, 350 F.2d 833, 837 (3rd Cir. 1965). See also Bowen v. City of New York, 476 U.S. 467, 480-482 (1986). (Tolling the period to seek review under section 405(g).). Thus, the court below should have equitably tolled the triggering of the 30 days for petitioner Melkonyan and other claimants similarly caught in a trap for the unwary.

Even if this Court accepts the decision of the Ninth Circuit in this case as a new rule of law overruling Guthrie, and its progeny, the decision by the court below should not be permitted to apply retroactively. This Court has held that to be applied nonretroactively, a judicial decision must establish a new principle of law, either by overruling clear past precedent on which litigants may have relied, or by deciding an issue of first im-

pression whose resolution was not clearly foreshadowed. Chevron Oil Co. v. Huson, 404 U.S. 97, 92 S.Ct. 349, 30 L.Ed. 296 (1971).

It is apparent that the Ninth Circuit's decision in this case establishes a new rule of law which overrules clear past precedent relied upon by the petitioner and many other claimants and their attorneys to their detriment, so that the decision of the court below should have been applied prospectively.

CONCLUSION

Petitioner Melkonyan respectfully requests that a writ of certiorari issue.

Respectfully submitted,

John Ohanian, Inc.

John Ohanian, Inc.
Counsel of Record for Petitioner
A Professional Corporation

6381 Hollywood Blvd.,Ste. 765
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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1990

No. _____

ZAKHAR MELKONYAN, Petitioner

v.

MARGARET M. HECKLER, Secretary of Health and Human Services,

Respondent

PROOF OF SERVICE

I, John Ohanian, do swear that on this date, August 22, 1990, pursuant to Supreme Court Rules 29.3 and 29.4, I have served the attached MOTION FOR LEAVE TO PROCEED IN FORMA PAUPERIS and PETITION FOR A WRIT OF CERTIORARI on each party to the above proceeding, or that party's counsel, and on every other person required to be served by depositing an envelope containing the above documents in the United States mail properly addressed to each of them and with first-class postage prepaid.

The name and address of the party served is as follows:

Solicitor General, Department of Justice, Washington, D.C. 20530.

John Ohanian Affiant

Subscribed and Sworn to Before Me
this 22nd day of August 1990.

Notary Public in and for Los Angeles
County and State of California

OFFICIAL SEAL
ARLINE R. SHEARER
Notary Public California
Principal Office in
Los Angeles County
My Comm Exp Apr 18, 1991

APPENDIX

UNITED STATES DISTRICT COURT

CENTRAL DISTRICT OF CALIFORNIA

ZAKHAR MELKONIAN, Plaintiff, v. MARGARET M. HECKLER, SECRETARY OF HEALTH and HUMAN SERVICES, Defendant.	NO. CV 84-4317-MRP(K) FINDINGS ON AN APPLICATION FOR ATTORNEY'S FEES

These findings are submitted to the United States District Judge pursuant to the provisions of 28 U.S.C. § 636 and General Order 194 of the United States District Court of the Central District of California.

On June 8, 1984, plaintiff by counsel filed this complaint seeking review of the decision of the Secretary denying social security benefits. 42 U.S.C. § 405(g). The Magistrate ordered further proceedings and on October 18, 1984, plaintiff filed a motion for summary judgment. Defendant filed its cross motion on November 20th. Plaintiff filed a reply brief on December 4th to which defendant filed a supplemental memorandum

on December 18t. indicating that the Secret .y was granting a voluntary remand. On December 27, 1984, plaintiff filed objections to the motion for voluntary remand seeking a decision on the merits. On April 1, 1985, plaintiff withdrew his objections and the matter was subsequently remanded by order of the court. On May 7th, the Secretary issued a favorable decision. (Deft. Oppo. Exh. A.)

Plaintiff now seeks attorney's fees under the Equal Access to Justice Act. 28 U.S.C. § 2412(d).

A prerequisite to an award of fees and expenses under the Equal Access to Justice Act is a finding by the court that the position of the United States was not substantially justified and that there are no special circumstances making such an award unjust. 28 U.S.C. § 2412(d)(1)(A). In addition, the application must be filed within 30 days of final judgment. § 2412(d)(1)(B).

The evidence of the favorable award before the court indicates that the plaintiff who had filed his first application for benefits on May 28, 1982 filed a second application on May 30, 1984 and "[o]n the basis of evidence obtained in connection with the second application, the Disability Determination Service ("DDS") of the State of California determined that the claimant is limited to medium work and that, . . . Rule 203.10 of Table 3, . . . directs a finding that the claimant has been disabled since May 30, 1984." The award goes on to state that the determination "was based on a report of pulmonary function studies which were conducted on April 25, 1984, and an opinion by a physician designated by the Secretary dated June 7, 1984, ..."

The Secretary t n made a finding that the laintiff had been disabled since May 26, 1982 "based on the application filed on May 26, 1982, . . ." (Defendant's Oppo., Exh. A.)

It appears from the record before the court that the Secretary reconsidered plaintiff's claim based upon new evidence.[1/] Therefore this award is not a basis for finding that his original position was not "substantially justified."

The Magistrate has reviewed the administrative record submitted to the Secretary in support of the original application and finds that it does not justify a finding that the original decision of the Secretary denying benefits was substantially unjustified. The medical reports in that record do not indicate disability as defined under the Act. (Admin. Rec. pp. 42-43, 92-96.)[2/]

1/ See Plaintiff's Memo in Support, filed October 18, 1984, Exh. A.

2/ 20 C.F.R. 404.1520(c) was declared invalid by the Ninth Circuit on September 10, 1985. Yuckert v. Secretary, 774 F.2d 1364 (9th Cir. 1985). This was based on a finding that it was inconsistent with 42 U.S.C. 423(d)(2)(A) of the Social Security Act. A similar statute governs Supplemental Security Income (SSI), 42 U.S.C. 1382c(a)(3(B). The Secretary's first decision applied 20 C.F.R. 416.920(c) which insofar as material here, is identical with 404.1520(c). The Yuckert decision came some 17 months after the final decision of the Secretary in the instant case (April 9, 1984). The Magistrate believes that the latter was substantially justified under a reasonable interpretation of the the regulations then in effect.

It is the conclusion of the Magistrate that it cannot be said from the evidence of record that the position of the government was not substantially justified.

IT IS THEREFORE RECOMMENDED that the Court enter an Order denying the request for fees.

DATED: This 12th day of February, 1987.

JOHN R. KRONENBERG
United States Magistrate

UNITED STATES DISTRICT COURT

CENTRAL DISTRICT OF CALIFORNIA

ZAKHAR MELKONYAN, Plaintiff, v. MARGARET M. HECKLER, SECRETARY OF HEALTH and HUMAN SERVICES, Defendant.	NO. CV 84-4317-MRP(K) JUDGMENT DENYING ATTORNEY'S FEES

IT IS ADJUDGED that the request for attorney's fees is denied.

DATED: This 17 day of February, 1987.

MARIANA R. PFAELZER
United States District Judge

Zakhar MELKONYAN, Plaintiff-Appellant,

v.

Margaret M. HECKLER, Secretary of HHS, Defendant-Appellee.

No. 87-5716.

United States Court of Appeals, Ninth Circuit.

Argued and Submitted Jan. 10, 1989.

Submission Withdrawn March 22, 1989.

Resubmitted April 5, 1989.

Decided Jan. 31, 1990.

Successful applicant for supplemental security income (SSI) benefits sought to recover attorney fees and costs under the Equal Access to Justice Act. The United States District Court for the Central District of California, Mariana R. Pfaelzer, J., entered order denying application, on ground that position taken by Secretary of Health and Human Services in originally denying benefits was "substantially justified." Appeal was taken. The Court of Appeals, Wallace, Circuit Judge, held that time limit on claimant's application for attorney fees and costs under the EAJA began to run immediately upon decision of appeals council, so that application should have been dismissed as untimely.

Vacated and remanded.

1. United States ⇐147(6)

Statutory time limit on applications for attorney fees and costs under the Equal Access to Justice Act is jurisdictional in nature. 28 U.S.C.A. § 2412(d)(1)(B).

2. United States ⇐147(6)

District court order remanding plaintiff's action for supplemental security income (SSI) benefits to appeals council was not "final judgment," such as would trigger 30-day time limit on application for attorney fees and costs under the Equal Access to Justice Act. 28 U.S.C.A. § 2412(d)(1)(B).

See publication Words and Phrases for other judicial constructions and definitions.

3. United States ⇐147(6)

Time limit on social security claimant's application for attorney fees and costs under the Equal Access to Justice Act began to run immediately upon decision of appeals council, where appeals council determined that claimant was disabled as of disability onset date alleged in original application. 28 U.S.C.A. § 2412(d)(1)(B).

John Ohanian, John Ohanian, Inc., Los Angeles, Cal., for plaintiff-appellant.

Michael R. Power, Assistant Regional Counsel, Dept. of Health and Human Services, San Francisco, Cal., for defendant-appellee.

Appeal from the United States District Court for the Central District of California.

Before WALLACE, CANBY and TROTT, Circuit Judges.

ORDER

The opinion filed in the above case on June 30, 1989, is withdrawn.

OPINION

WALLACE, Circuit Judge:

Melkonyan appeals from the district court's judgment denying his application for attorneys' fees and costs under the Equal Access to Justice Act (EAJA), 28 U.S.C. § 2412. Melkonyan challenges the court's conclusion that the position taken by the Secretary of Health & Human Services (Secretary) was "substantially justified." Because Melkonyan's EAJA application was not filed within the jurisdictional time limit, we vacate the judgment and remand for dismissal by the district court.

I

On May 28, 1982, Melkonyan filed an application for supplemental security income (SSI) disability benefits under Title XVI of the Social Security Act (Act). 42 U.S.C. §§ 1381 *et seq.* The application was denied. After a hearing, an administrative law judge (ALJ) again denied the application, determining that Melkonyan was not disabled within the meaning of the Act. The Appeals Council affirmed the ALJ's decision on April 9, 1984. On June 8, 1984, Melkonyan filed a complaint in district court seeking review pursuant to 42 U.S.C. § 1383(c)(3), which incorporates the judicial review provisions of 42 U.S.C. § 405(g).

Meanwhile, on May 30, 1984, Melkonyan filed a new application for SSI disability benefits supported by new evidence of disability. He learned on August 9, 1984, that this application was approved.

On October 18, 1984, Melkonyan filed a motion in district court for summary judgment, which included the new evidence of his disability. The Secretary offered and Melkonyan refused a stipulated remand for further administrative proceedings. The Secretary then moved for a court-ordered remand pursuant to 42 U.S.C. § 405(g), which Melkonyan initially opposed and then supported. On April 5, 1985, the district court entered its order to remand.

On May 7, 1985, the Appeals Council vacated the ALJ's decision rejecting Melkonyan's original application, and determined that he was disabled as of the date of his original application. The determination of Melkonyan's benefits occurred on September 11, and he was paid on September 17, 1985. Melkonyan sought no further administrative or judicial review in connection with the award of benefits.

On May 19, 1986, Melkonyan filed a motion in district court for attorneys' fees and costs in a civil action against the United States pursuant to the EAJA, 28 U.S.C. § 2412(d). The Secretary opposed on the grounds that Melkonyan was not a "prevailing party," and that even if he were, the government's position had been "substantially justified." The court denied Melkonyan's request, holding that the government's position had been substantially justified. This appeal followed.

II

[1] 28 U.S.C. § 2412(d)(1)(A) provides that a party prevailing in a suit against the United States or one of its agencies should receive attorneys' fees, costs, and other expenses incurred in the civil action "unless the court finds that the position of the United States was substantially justified or that special circumstances make an award unjust." *Id.* A party requesting such an award must submit an application to the court "within thirty days of final judgment in the action." 28 U.S.C. § 2412(d)(1)(B). The 30-day time limit is jurisdictional. *See Papazian v. Bowen*, 856 F.2d 1455, 1455-56 (9th Cir.1988) (*Papazian*); *Barry v. Bowen*, 825 F.2d 1324, 1327-29 (9th Cir. 1987); *see also MacDonald Miller Co. v. NLRB*, 856 F.2d 1423, 1424 (9th Cir.1988) (so construing 30-day time limit in another section of the EAJA); *Columbia Manufacturing Corp. v. NLRB*, 715 F.2d 1409, 1410 (9th Cir.1983) (same). Final judgment in this context means "a judgment that is final and not appealable, and includes an order of settlement." 28 U.S.C. § 2412(d)(2)(G). This definition applies to Melkonyan's case, which was pending when the definition was revised by amendments to the EAJA on August 5, 1985. Equal Access to Justice Act, Extension and Amendment, Pub.L. No. 99-80 § 7(a), 99 Stat. 183, 186 (1985) (EAJA Extension Act); *see McQuiston v. Marsh*, 790 F.2d 798, 800 (9th Cir. 1986) (*McQuiston II*).

We must first consider the threshold jurisdictional question whether Melkonyan submitted his request within 30 days of final judgment, as defined by the EAJA Extension Act. The problem lies in identifying the relevant "judgment that is final and not appealable." 28 U.S.C. § 2412(d)(2)(G). We interpret the EAJA de novo. *Kali v. Bowen*, 854 F.2d 329, 331 (9th Cir.1988).

[2] The district court order remanding to the agency for further administrative proceedings was not a final judgment for purposes of 28 U.S.C. § 2412(d)(1)(B). *Papazian*, 856 F.2d at 1455-56. There, an ALJ rejected Papazian's application for dis-

ability benefits under Title II of the Social Security Act on the grounds that Papazian was not disabled. *Id.* at 1455. The Appeals Council affirmed by denying review. *Id.* Papazian sought judicial review, but while his complaint was pending in district court, the parties agreed to a court order remanding for "further administrative proceedings." *Id.* at 1455–56. On remand, the Appeals Council found Papazian disabled and awarded him benefits. The district court concluded that Papazian's subsequent petition for fees was untimely because the 30 days since the remand order had expired. *Id.*

We reversed because neither the parties nor the district court intended the remand to end the litigation, particularly in light of the reference to "further administrative proceedings." *Id.* at 1456. Similarly, both parties here expected further administrative proceedings to follow the remand. Thus, the district court order of remand was not a "judgment that is final and not appealable" and therefore did not trigger the 30–day period. *See also Swenson v. Heckler*, 801 F.2d 1079, 1080 (9th Cir.1986) (holding that claimant who obtains order of remand not entitled to EAJA fees, but basing decision on "prevailing party" rather than "finality"); *Singleton v. Bowen*, 841 F.2d 710, 711–12 (7th Cir.1988) (same).

In *Papazian*, after the Appeals Council awarded the claimant benefits, the district court adopted the decision and entered it as its own judgment. 856 F.2d at 1455. We looked to this district court judgment, rather than the Appeals Council's award of benefits on remand, in determining what constituted the final judgment for purposes of section 2412(d)(1)(B). *Id.* at 1455–56. Here, however, the district court entered no such judgment. We are faced with a problem not confronted by us in *Papazian*: If the remand order lacks finality, and there is no subsequent district court order, what event triggers the 30–day time limit prescribed by 28 U.S.C. § 2412(d)(1)(B)? We are forced to resolve this problem because our jurisdiction rests on its outcome.

Pursuant to 28 U.S.C. § 2412(d)(1)(B), the 30–day time limit is triggered by a "final judgment in the action." Section 2412(d)(2)(G) goes on to define a "final judgment" as "a judgment that is final and not appealable." On May 7, 1985, the Appeals Council vacated the ALJ's original decision rejecting Melkonyan's application, and determined that he was disabled as of the disability onset date that he alleged in his original application. We must determine whether this decision constituted a "final judgment" within the meaning of section 2412(d)(2)(G) and triggered the 30–day period for seeking EAJA fees under section 2412(d)(1)(B).

[3] As we held in *McQuiston II*, the 30–day period does not begin to run until the time to appeal expires. 790 F.2d at 800. Ordinarily, this means that the 30–day period will start 65 days after the date on the notice of the Secretary's determination of eligibility for benefits. *See* 20 C.F.R. §§ 416.1401, 1481, 1483 (1988) (60 days to seek district court review of the Appeals Council decision, plus 5 days between date of notice and date notice deemed received). However, where, as here, the Secretary determines that the claimant was disabled as of the disability onset date that the claimant alleged in his original application, the 30–day period begins to run immediately upon the decision of the Appeals Council. This rule is appropriate because the Secretary's decision is "not appealable" by either the claimant or the Secretary. We do not need to address the question of when the Secretary's remand decision which is either partially favorable or unfavorable to a claimant becomes a final judgment.

The decision by the Appeals Council constitutes the final decision of the Secretary. *Sullivan v. Hudson*, — U.S. —, 109 S.Ct. 2248, 2252, 104 L.Ed.2d 941 (1989). Section 405(g) entitles only an "individual" to appeal the Secretary's decision. *Jones v. Califano*, 576 F.2d 12, 18 (2d Cir.1978). Thus, the Secretary would not have standing or reason to complain of his own final decision. Likewise, if a claimant wholly prevails on his claim, he would have no reason to appeal that decision.

We, therefore, conclude that the "final judgment" in Melkonyan's action was rendered on May 7, 1985. But Melkonyan did not move for EAJA fees until more than one year after this "final judgment." The district court therefore lacked subject matter jurisdiction to entertain his application. 28 U.S.C. § 2412(d)(1)(B); *Papazian*, 856 F.2d at 1455–46. Accordingly, we do not reach the question whether the government's position was substantially justified. Instead, we vacate and remand to the district court for dismissal.

In making our decision, we are confronted with what appears to be a different approach to this problem by a sister circuit. In *Guthrie v. Schweiker*, 718 F.2d 104 (4th Cir.1983) (*Guthrie*), the Fourth Circuit ordered the district court to direct the Secretary to make the filing 42 U.S.C. § 405(g) describes. *Id.* at 106. After this filing, the Fourth Circuit directed the district court to enter a final judgment so that the section 2412(d)(1)(B) 30–day period would begin. *Id.*; *accord Brown v. Secretary of Health & Human Services*, 747 F.2d 878, 884–85 (3d Cir.1984); *see also* H.R.Rep. No. 120, 99th Cong., 1st Sess., pt. 1 at 19–20 (1985), *reprinted in* 2 1985 U.S.Code Cong. & Admin.News 132, 148 (legislative history of 1985 amendments to EAJA stating that neither remand to agency nor agency decision after remand constitutes final judgment; approving *Guthrie* and *Brown* holdings that district court order after Secretary makes required post-remand filing constitutes "final judgment" triggering 30–day period).

Guthrie's approach is troublesome. While section 405(g) requires the Secretary to file the new decision and findings after remand, it does not confer upon the district court any independent power to review the post-remand filing. The agency's decision may be reviewed by the district court only if a claimant appeals within the 60–day time limit. *See* 42 U.S.C. § 405(g); 20 C.F.R. §§ 416.1401, 1481 (1988). The Secretary's post-remand decision is reviewable only to the extent that the agency's original decision and findings were reviewable. 42 U.S.C. § 405(g). Unless the ordinary procedural requirements for judicial review of an agency decision are met, we are at a loss to find a basis for the district court to enter any order or judgment affirming, modifying, reversing or remanding the Secretary's post-remand filing. Nor do we see any advantage to such an approach. Established procedures already allow a claimant dissatisfied with the Secretary's decision on remand to secure judicial review. 20 C.F.R. §§ 416.1401, 1481 (1988). In such a case, the section 405(g) requirement that the Secretary furnish the findings, decision, and record supplements the claimant's appeal. If the Secretary's decision is wholly in favor of the claimant, we are hard pressed to see a need for the overburdened district courts to deploy scarce judicial resources in a sua sponte "affirmation" of uncontested eligibility decisions.

More importantly, *Guthrie* was decided before the 1985 EAJA amendment which effectively redefined "final judgment" as "a judgment that is final and not appealable." *See* 28 U.S.C. § 2412(d)(2)(G); *McQuiston II*, 790 F.2d at 800. *Guthrie* explicitly relied on the "common usage" definition of final judgment articulated in *McQuiston v. Marsh*, 707 F.2d 1082, 1085 (9th Cir.1983), which *McQuiston II* held had been overruled by the 1985 amendment. *McQuiston II*, 790 F.2d at 800; *Guthrie*, 718 F.2d at 106. The Fourth Circuit assumed that final judgment meant the type of judgment provided under Fed. R.Civ.P. 54, a judgment only a court could enter. 718 F.2d at 106. Thus, only a court's judgment could be a final judgment triggering the 30–day period to submit an application for EAJA fees. *Id.* The revised statute, aside from its use of the term "judgment," gives us no reason to think that this is so. *See* 28 U.S.C. §§ 2412(d)(1)(B) & (d)(2)(G). It does not appear, therefore, that we should interpret "judgment" in this context as requiring a judgment by a court. For these reasons, we do not remand this case ordering the district court to enter a final judgment with the thought that the section 2412(d)(1)(B) 30–day period would begin.

Our approach not only sets definite limits for purposes of finality, but it also benefits

individuals seeking EAJA awards under section 2412 in similar circumstances. Rather than wait for the Secretary to make a post-remand filing and wait for that filing to be affirmed by the district court, such individuals may seek EAJA awards as soon as the agency's action on remand becomes a "final judgment" under section 2412(d)(2)(G).

We therefore vacate the judgment of the district court and remand this case for dismissal for lack of subject matter jurisdiction.

VACATED AND REMANDED WITH INSTRUCTIONS TO DISMISS.

1. Statutes ⇐223.2(1)

Complementary provisions of Title VII and Age Discrimination in Employment Act are to be construed consistently. Civil Rights Act of 1964, § 701 et seq., 42 U.S.C.A. § 2000e et seq.; Age Discrimination in Employment Act of 1967, § 2 et seq., 29 U.S.C.A. § 621 et seq.

2. Civil Rights ⇐169

Deputy city attorney was excluded from coverage under Age Discrimination in Employment Act (ADEA) as member of personal staff of elected city attorney, even though he was not personally entrusted with great deal of responsibility, since he was placed in public eye as representative of city attorney's office, was empowered to exercise legal authority of that office and held office at "pleasure" city attorney rather than subject to city's civil service laws. Age Discrimination in Employment Act of 1967, §§ 2 et seq., 11(f), 29 U.S.C.A. §§ 621 et seq., 630(f); West's Ann.Cal.Gov.Code § 1301.

Raymond E. MONCE, Plaintiff-Appellant,

v.

CITY OF SAN DIEGO, Defendant-Appellee.

No. 88-6389.

United States Court of Appeals, Ninth Circuit.

Argued and Submitted Jan. 11, 1990.

Decided Feb. 1, 1990.

Former deputy city attorney brought suit alleging age discrimination in his termination. The United States District Court for the Southern District of California, Howard B. Turrentine, J., dismissed action for lack of jurisdiction. Deputy city attorney appealed. The Court of Appeals, Farris, Circuit Judge, held that position of deputy city attorney was exempt from Age Discrimination in Employment Act under personal staff exception.

Affirmed.

Gordon E. vonKalinowski, San Diego, Cal., on the brief, for plaintiff-appellant.

Michael G. Nardi, Seltzer Caplan Wilkins & McMahon, San Diego, Cal., for defendant-appellee.

John F. Suhre, Washington, D.C., for amicus curiae E.E.O.C.

Raymond Monce, Spring Valley, Cal., pro se.

Appeal from the United States District Court for the Southern District of California.

Before SCHROEDER, FARRIS and NOONAN, Circuit Judges.

FARRIS, Circuit Judge:

This is an appeal from an order dismissing the plaintiff's complaint alleging age discrimination. Raymond Monce, a former deputy San Diego city attorney, alleges that he was constructively discharged from his position because of his age, in violation of the Age Discrimination in Employment Act, 29 U.S.C. § 621 et seq. The district court found that Monce was not an employee covered by the ADEA because he was a member of the personal staff of an elected

ORIGINAL

No. 90-5538

IN THE SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1990

ZAKHAR MELKONYAN, PETITIONER

v.

LOUIS W. SULLIVAN
SECRETARY OF HEALTH AND HUMAN SERVICES

ON PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

BRIEF FOR THE RESPONDENT IN OPPOSITION

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QUESTION PRESENTED

Whether, in a Social Security case that is remanded to the Secretary for further proceedings, a final, non-appealable administrative decision in favor of the claimant on remand commences the 30-day period in which an attorney's fee application must be filed under the Equal Access to Justice Act, 28 U.S.C. 2412(d)(1)(B).